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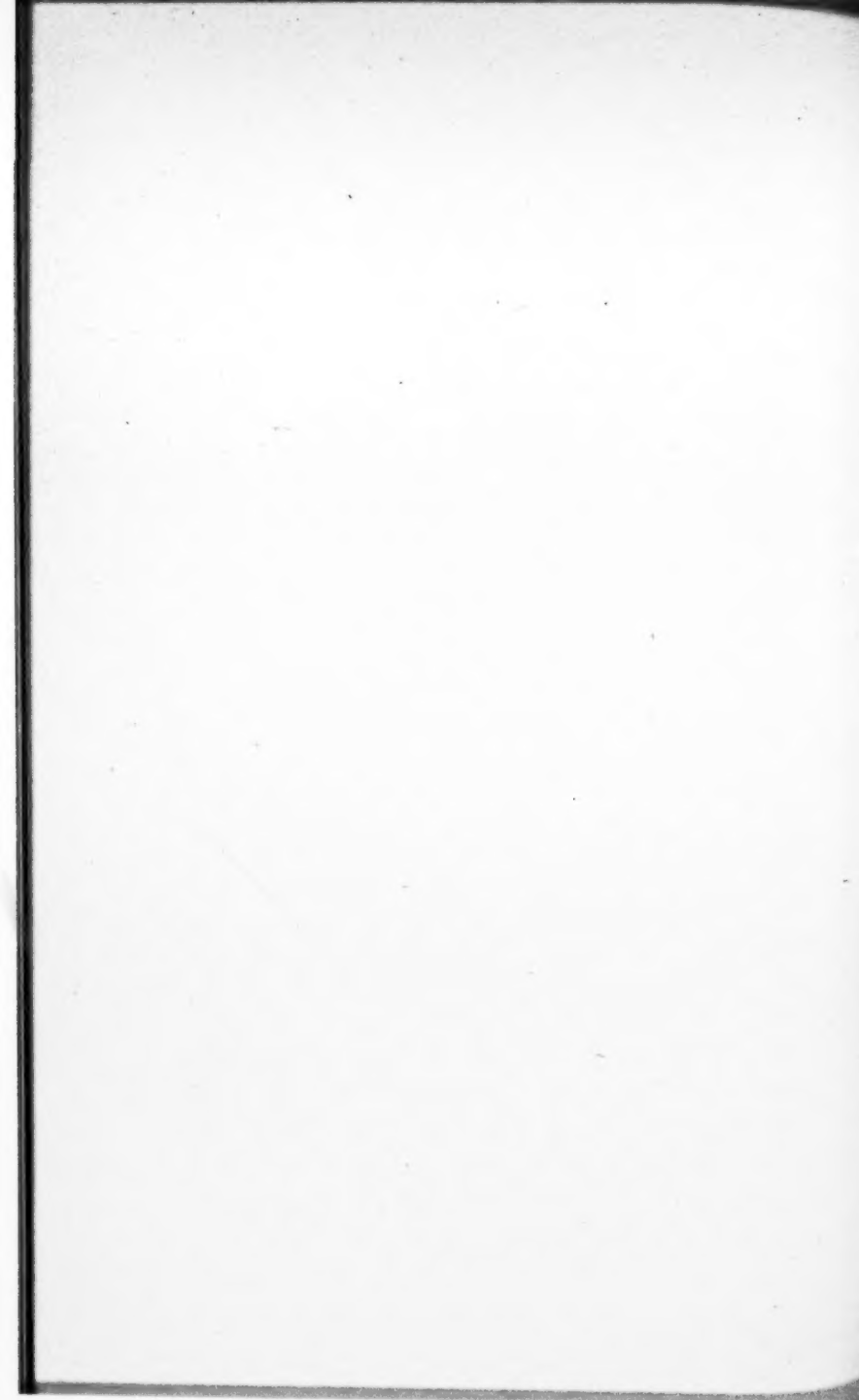
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(I)



# *In the Supreme Court of the United States*

OCTOBER TERM, 1943

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No. 413

ANDREW JERGENS, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## **OPINIONS BELOW**

The memorandum opinion of the Board of Tax Appeals (R. 26), now the Tax Court of the United States, is not officially reported. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 71) is reported in 136 F. 2d 497.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on June 15, 1943 (R. 79), and petition for rehearing was denied on July 17, 1943 (R. 86). Petition for a writ of certiorari was filed October 7, 1943. Jurisdiction of the Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

The taxpayer was given unlimited right, at any time, to terminate the trust created by his wife (with property which he had previously given her) and to take the income-producing corpus as his own. Due to his unfettered control of the property, is the income taxable to the taxpayer under Section 22 (a) of the Revenue Acts of 1936 and 1938?

#### STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

##### SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \*

\* \* \* \* \*

This section appears without change in the Revenue Act of 1938, c. 289, 52 Stat. 447.

## STATEMENT

The following facts were stipulated (R. 45-65) and found by the Board of Tax Appeals (R. 27-34):

The taxpayer is an individual residing in Palm Beach, Florida. The returns for the years involved were filed with the Collector of Internal Revenue for the Florida District at Jacksonville, Florida. (R. 27, 45.)

In 1922 the taxpayer caused to be transferred to his then wife 923 shares of the common stock of The Andrew Jergens Company of California (R. 27, 46).

In December of 1934 the taxpayer's wife applied for and received on December 26, 1934, insurance in the amount of \$255,000 on the life of her husband (R. 27-28, 46). By the terms of the policies the wife was designated as the owner, beneficiary, and the one obligated to pay the premiums (R. 27-28, 46). On December 31, 1934, the taxpayer's wife created a trust, naming The First National Bank of Cincinnati, Ohio, and her husband as co-trustees (R. 28, 46).

On the same day the taxpayer's wife, pursuant to the trust agreement, transferred to the trust all her right, title, and interest in the insurance policies and 685 shares of the Jergens stock above referred to (R. 28, 46-47).

Under the terms of the trust, the net income was to be applied (a) to pay the premiums on the

life-insurance policies issued on the life of the taxpayer and held in the trust; (b) to make certain monthly payments to an aunt of the wife; (c) to pay the remaining net income to the wife during her life (R. 32, 54-55).

The trust instrument provided that the co-trustee bank should follow and abide by the instructions of the taxpayer, so long as he lived, "in all matters pertaining to the Trust property" (R. 31, 53). The taxpayer was vested with the sole right to vote the stock held in the trust and to designate the investment counsel whose instructions the bank was to follow (R. 31, 53).

The trust instrument also provided the following:

(1) That during the life of the grantor, the taxpayer should have full authority to withdraw any part or all of the corpus of the trust, with the exception of the policies of insurance upon his own life (which could only be withdrawn with the consent of the grantor) (R. 32, 55);

(2) that unless the trust was terminated and revoked by the taxpayer, prior to the death of the grantor, the trust should be irrevocable (R. 33, 55);

(3) that the taxpayer, in addition to the power to terminate or revoke the trust, should also have the power to alter, modify or amend the agreement in any respect whatsoever (except that he could not make the proceeds of the insurance policies payable to his estate) (R. 33, 55-56);

(4) that in the event the taxpayer had not terminated or revoked the trust prior to the death of the grantor, the trust should terminate at her death and all of the trust property be then transferred to the taxpayer if he be living or to the lawful issue or any legally adopted children of the taxpayer and the grantor (R. 33, 56);

(5) that in the event the taxpayer should predecease the grantor, leaving no issue or adopted children, the trust property should continue in trust for a period of five years after the grantor's death, as a charitable and educational trust, the terms of which are not here relevant (R. 33, 56-57).

During 1936, 1937, and 1938, the taxable years in question, the trust agreement was in full force and effect (R. 28, 47). For these years the trustees filed fiduciary income tax returns for the trust and paid tax on the trust income, and the taxpayer's wife reported as income the sums received by her from the trust and paid tax thereon (R. 29, 48).

Deficiencies were assessed by the Commissioner against the grantor of the trust on the theory that the trust income was entirely taxable to her (R. 30, 48-49). The Board of Tax Appeals held that the income was not taxable to the grantor and the Fifth Circuit Court of Appeals affirmed the Board in *Commissioner v. Jergens*, 127 F. 2d 973.

Deficiency assessments against the taxpayer of \$6,060.50 for 1936, \$15,268.93 for 1937, and



\$13,048.23 for 1938, on the ground that the income was taxable to him were, however, sustained by the Board (R. 35) and affirmed by the Fifth Circuit Court of Appeals (R. 79).

#### ARGUMENT

The decision of the court below is in accord with that of the Circuit Court of Appeals for the Second Circuit upon substantially identical facts in *Richardson v. Commissioner*, 121 F. 2d 1, certiorari denied, 314 U. S. 684, rehearing denied, 314 U. S. 714. This Court has clearly enunciated the principles followed by the Board of Tax Appeals and the court below in determining that the taxpayer's unfettered control over the trust property was the equivalent of ownership for tax purposes and that the trust income was taxable to him under Section 22 (a) of the Revenue Acts of 1936 and 1938, *supra*. *Harrison v. Schaffner*, 312 U. S. 579; *Helvering v. Horst*, 311 U. S. 112; *Helvering v. Clifford*, 309 U. S. 331; *Lucas v. Earl*, 281 U. S. 111; *Corliss v. Bowers*, 281 U. S. 376.

The taxpayer had the power to alter, modify and amend the trust, except that he could not make the proceeds of the insurance policies payable to his estate. Since all of the income here involved was produced by other property than the insurance policies, any limitation of his power to deal with them is of no consequence. The taxpayer also had the absolute power to withdraw

any or all of the income-producing property of the trust and to devote it to his own use or benefit. His power over and control of the property was far greater and more immediate than that of the taxpayer in *Helvering v. Clifford, supra*. Taxpayer relies on two distinctions:

(1) That he was not the grantor of the trust, and

(2) that he did not actually take the property from the trust. Both distinctions are without substance. The fact that he actually had complete dominion over the property, whether it was acquired or retained, is the vital factor. *Richardson v. Commissioner, supra*. Because of taxpayer's full authority to rewrite the trust and dispose of the income and corpus as he pleased, he bore the same relationship to the property as a grantor. Nor is it material that he did not choose to terminate the trust. He was entirely free to do so. The principle to be followed was expressed by this Court in *Corliss v. Bowers, supra* (p. 378):

The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not. \* \* \*

The decision of the lower court is not in conflict with *Commissioner v. Giannini*, 129 F. 2d 638 (C. C. A. 9th), or with *Commissioner v. Mott*, 85 F. 2d 315 (C. C. A. 6th), as alleged by the taxpayer. In each of those cases the taxpayer

unconditionally declined to accept compensation for services rendered and in each instance it was held that the taxpayer was not taxable upon the income which he had refused to accept. In neither instance did the taxpayer accept any control over the disposition of the income. In the present case, the taxpayer was irrevocably given a power of revocation of the trust which he accepted. From then on he had complete command of the source of the income. He also accepted unlimited power to alter or amend the provisions of the trust relative to the income therefrom. Although the foregoing decisions may be doubtful they are not in conflict with the decision herein.

#### CONCLUSION

The decision of the court below is correct. There is no conflict. The petition should be denied.

Respectfully submitted.

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